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KUWAIT FINANCE HOUSE (MALAYSIA) BHD v. JRI RESOURCES SDN BHD & ORS

HIGH COURT MALAYA, SHAH ALAM
ROZANA ALI YUSOFF JC
[SUIT NO: 22NCVC-584-09-2013]
B 20 SEPTEMBER 2016

BANKING: *Islamic banking – Shariah Advisory Council (SAC) – Roles of – Reference of questions concerning Shariah matter to SAC – Whether an usurpation of judicial function of court – Whether ss. 56 & 57 of Central Bank of Malaysia Act 2009 have effect of vesting judicial power in SAC – Whether role and duties of court and SAC mutually exclusive*

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CONSTITUTIONAL LAW: *Courts – Judicial power – Reference of questions concerning Shariah matter to Shariah Advisory Council (SAC) – Whether ss. 56 & 57 of Central Bank of Malaysia Act 2009 have effect of vesting judicial power in SAC – Whether ss. 56 & 57 valid and constitutional Federal law – Whether both sections fall under scope of art. 128 of Federal Constitution – Whether role and duties of court and SAC mutually exclusive – Federal Constitution, arts. 74(1) & 128*

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ISLAMIC LAW: *Banking and finance – Shariah Advisory Council (SAC) – Roles of – Reference of questions concerning Shariah matters to SAC – Whether an usurpation of judicial function of court – Whether ss. 56 & 57 of Central Bank of Malaysia Act 2009 have effect of vesting judicial power in SAC – Whether role and duties of court and SAC mutually exclusive*

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The plaintiff granted various Islamic facilities to the first defendant, including five Ijarah Muntahiah Bitamlik facilities ('Ijarah facilities'), guaranteed by the second and fourth defendants. In breach of their obligations, the defendants defaulted and failed in settling the outstanding sum due to the plaintiff under the Islamic facilities granted. The plaintiff thus claimed for the outstanding amounts due and owing and successfully obtained summary judgment against the defendants. The defendants appealed to the Court of Appeal and submitted that the High Court had erred in not referring the Shariah issue to the Shariah Advisory Council ('SAC') and that the High Court should have made such reference pursuant to s. 56 of the Central Bank of Malaysia Act 2009 ('CBA'). The Court of Appeal, in allowing the defendants' appeal, ordered that the matter was remitted to the High Court for a retrial and that the trial would only involve one issue *ie*, whether cl. 2.8 of the Ijarah agreements was Shariah compliant. The question was then referred to the SAC by the court. The SAC ruled that cl. 2.8 was Shariah compliant and went on further to state that their duty was only to ascertain and analyse the Shariah issue found in the question and to state the 'hukum syarak' with regard to the same. The SAC made it clear that they were not making a finding on the facts of the case or a decision on the outcome of the litigation as that was strictly under the jurisdiction of the High

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Court. Hence, this application by the first defendant pursuant to art. 128(2) of the Federal Constitution and s. 84 of the Courts of Judicature Act 1964, *inter alia*, for an order that the High Court state, as a special case, questions that had arisen as to the effect of the Federal Constitution on matters in dispute in this civil suit and for an order that the court transmits the special case to the Federal Court for determination. The grounds relied on by the first defendant were (i) the questions referred in respect of the constitutionality of ss. 56 and 57 of the CBA have a direct bearing to the proceedings before this court; (ii) the determination of the questions was relevant and necessary for a speedy and economical final determination of the proceedings in view of the ruling made by the SAC; and (iii) the determination of the questions was relevant and necessary for the fair and just disposal of the proceedings. The defendant contended that ss. 56 and 57 of the CBA are unconstitutional and void as it has the effect of vesting judicial power in the SAC in contravention of arts. 8 and 121 of the Federal Constitution. On the other hand, the plaintiff submitted that the first defendant's application must be dismissed as the Court of Appeal in *Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd* ('*Tan Sri Abdul Khalid*') had decided that ss. 56 and 57 of the CBA are constitutional and by virtue of the doctrine of *stare decisis*, the decision was a binding authority.

Held (dismissing first defendant's application with costs):

(1) Sections 56 and 57 of the CBA are valid and constitutional federal law made pursuant to art. 74(1) read together with Item 4(10) of the Federal List of the Ninth Schedule of the Federal Constitution for the ascertainment of Islamic law. It has already been established by the Court of Appeal in *Tan Sri Abdul Khalid* that ss. 56 and 57 of the CBA are valid and constitutional and it follows that both sections do not fall under the scope of art. 128 of the Federal Constitution. Therefore, there was no need for a referral to be made to the Federal Court. (para 12)

(2) The function of SAC is only to ascertain Islamic law on financial matters or business, while the function of the judiciary is to decide on the issues pleaded by the parties and to decide on the final outcome of a suit. Therefore, ss. 56 and 57 of the CBA could not be said to usurp the judicial functions of a court. The Court of Appeal in *Tan Sri Abdul Khalid* made a clear distinction between the role of the judiciary and the SAC and held that the SAC does not perform any judicial function. (para 12)

(3) The reference made to the SAC by the order of the Court of Appeal was only for the ascertainment of Shariah law regarding cl. 2.8 of the Ijarah agreements *ie*, whether the clause was Shariah compliant. The reference was not made to SAC to decide on any other issue of facts between the parties nor was it for the final determination of the dispute between the parties. In fact, the SAC made it clear from the outset that its role in this

matter was confined to analysing Shariah issues and was not exercising any judicial function when reference was made to it pursuant to s. 56 of the CBA. Hence, ss. 56 and 57 of the CBA do not have the effect of vesting judicial power in the SAC and the roles and duties of the court and SAC are mutually exclusive. (paras 12 & 13)

Case(s) referred to:

Assistant Collector Of Land Revenues & Ors v. Alfeus Yahsu & Anor And Another Appeal [2016] 7 CLJ 848 CA ***(refd)***

Mohd Alias Ibrahim v. RHB Bank Bhd & Anor [2011] 4 CLJ 654 HC ***(refd)***

Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd [2013] 4 CLJ 794 CA ***(refd)***

Legislation referred to:

Central Bank of Malaysia Act 2009, ss. 56, 57
Courts of Judicature Act 1964, s. 84
Federal Constitution, arts. 8, 74, 121, 128(2)

For the plaintiff - Samuel Tan & KC Tan; M/s Shook Lin & Bok
For the 1st & 2nd defendants - Pradeep Kumar, Dinesh & Henna Nandra Jog
For the 3rd defendant - Hakimi
For the 4rd defendant - Haniff Khatri & Irzan

Reported by S Barathi

JUDGMENT

Rozana Ali Yusoff JC:

Introduction

[1] This is an application by the first defendant pursuant to art. 128(2) of the Federal Constitution and s. 84 of the Courts of Judicature Act 1964 for:

(a) An order that the High Court state as a special case questions which have arisen as to the effect of the Federal Constitution on matters in dispute in this civil suit;

(b) An order that this court transmits the special case to the Federal Court for determination;

(c) An order that pending the determination of the special case by the Federal Court all proceedings in the High Court be stayed;

[2] The grounds for the application are as follows:

(a) The questions referred in respect of the constitutionality of ss. 56 and 57 of the Central Bank of Malaysia Act 2009 have a direct bearing to the proceedings before this court;

(b) The determination of the questions is relevant and necessary for a speedy and economical final determination of the proceedings in view of the ruling made by the Shariah Advisory Council on 28 June 2016;

(c) The determination of the questions is relevant and necessary for the fair and just disposal of the proceedings.

Background

[3] The plaintiff had granted various Islamic facilities to the first defendant, which includes five Ijarah Muntahiah Bitamlik facilities (referred to as "the Ijarah facilities"). These Ijarah facilities involved the lease financing of several vessels by the plaintiff. The second and fourth defendants are the guarantors for the all the monies due and owing by the first defendant to the plaintiff under the Ijarah facilities. In breach of their obligations, the defendants have defaulted and failed in making payment of the amounts outstanding to the plaintiff under the Islamic facilities granted (including the Ijarah facilities).

[4] On 2 September 2013, the plaintiff filed its writ and statement of claim against the defendants. In early 2014, the plaintiff proceeded to file its application for summary judgment against the defendants to recover the outstanding amounts due and owing. In opposing the summary judgment, the first defendant contended that the failure to derive income from the charter proceeds from leasing the vessels which was financed by the plaintiff was due to the failure of the plaintiff to carry out the major maintenance works on the vessels. The first defendant further alleged that major maintenance on the vessels is the responsibility of the plaintiff. The High Court allowed the plaintiff's claim for outstanding amounts due and owing amounting to RM118,261,126.26. The High Court in dealing with the summary judgment chose to give effect to cl. 2.8 of the Ijarah agreements which provides:

> Notwithstanding the above clause 2.7, the Parties hereby agree that the Customer shall undertake all of the Major Maintenance as mentioned herein and the Customer will bear all the costs, charges and expenses in carrying out the same.

[5] Subsequently, the defendants appealed to the Court of Appeal against the summary judgments entered on 3 October 2014. During the hearing of the appeal on 15 September 2015, the first defendant submitted to the Court of Appeal that the High Court had erred in not referring the Shariah issue to the Shariah Advisory Council (referred to as "SAC") and that the High Court should have made such reference pursuant to s. 56 of the Central Bank of Malaysia Act 2009 (referred to as "CBA").The Court of Appeal then allowed the appeals on 15 September 2015 and ordered that this matter be reverted back to the High Court herein for a retrial. The Court of Appeal further ordered that the trial will only involve one issue, which is whether cl. 2.8 of the Ijarah agreements is Shariah compliant. The following question is to be referred to SAC.

> Whether clause 2.8 of all the Ijarah Agreements (4 in total) between the Plaintiff and its customer (the 1st Defendant) is Shariah compliant, in the light of the Shariah Advisory Council resolutions made during its 29th meeting on 25.9.2002, the 36th meeting dated 26.6.2003 and the 104th meeting dated 26.8.2010.

[6] The question was then subsequently referred by this court to the SAC and on 30 June 2016, the SAC ruled that cl. 2.8 is Shariah compliant and that, *inter alia*, the owner and the lessee can negotiate and agree as to who will bear all the costs of maintaining the leased assets. The SAC in its letter states that their duty is only to ascertain and analyse the Shariah issues found in the question and to state the "hukum syarak" with regard to the same. The SAC further made it clear that they are not making a finding on the facts of the case or a decision on the outcome of the litigation as that is strictly the jurisdiction of the High Court. Below is the reproduce of the SAC letter.

Rujukan Mahkamah Kepada Majlis Penasihat
Shariah Bank Negara
Malaysia (Guaman Sivil No.: N22NCVC-584-09/2013)

Kuwait Finance House (Malaysia) Berhad lwn. JRI Resources Sdn Bhd, Ismail bin Kamin, Zulhizzan bin Ishak@Muhamad & Norazam bin Ramli

Pendahuluan

Dalam menjawab soalan yang dikemukakan oleh mahkamah, MPS mengambil ingatan bahawa tugas MPS hanyalah untuk menganalisis isu-isu Syariah yang terkandung di dalam setiap soalan yang dikemukakan dan menyatakan hukum Syarak mengenalnya. MPS tidak mempunyai bidang kuasa bagi membuat penemuan fakta (finding of facts) atau memakai (apply) sesuatu hukum itu kepada fakta kes dan membuat keputusan, sama ada mengenai sesuatu isu atau bagi kes tersebut kerana ia terletak dalam bidang kuasa mahkamah.

Persoalan yang Dirujuk:

Whether clause 2.8 in all Ijarah Agreement (4 in total) between the Plaintiff and its customer (the 1st Defendant) is Shariah compliant, in the light of the Shariah Advisory Council resolution made during its 29th meeting on 25.9.2002, the 36th meeting dated 26.6.2003 and the 104th meeting dated 26.8.2010.

Sama ada klausa 2.8 dalam semua Perjanjian Ijarah (empat kesemuanya) antara Plaintif dan pelanggannya (Defendan Pertama) adalah patuh Syariah, berdasarkan resolusi Majlis Penasihat Shariah pada mesyuarat ke-29 bertarikh 25.9.2002, mesyuarat ke-36 bertarikh 26.6.2003 dan mesyuarat ke-104 bertarikh 26.8.2010.

Jawapan

Setelah merujuk kepada keputusan mesyuarat MPS yang terdahulu, berhubung isu kos penyelenggaraan aset ijarah, MPS telah memutuskan bahawa secara prinsipnya, kos penyelenggaraan berkaitan hak milik aset ijarah ialah tanggungjawab pemilik, manakala kos berkaitan manfaat sewa ialah tanggungjawab penyewa. Namun begitu, terdapat beberapa aturan yang dibenarkan oleh MPS iaitu:

i. Pemilik aset boleh mewakilkan kepada penyewa untuk menanggung kos penyelenggaraan aset dan amaun kos tersebut akan ditolak selesai dalam urus niaga jual beli aset pada akhir tempoh sewaan; atau

ii. Pemilik dan penyewa boleh berunding dan bersetuju untuk memutuskan pihak yang akan menanggung kos penyelenggaraan aset.

[1] Keputusan MRS sebelum tarikh yang tertera di dalam kontrak yang dirujuk dimeterai.

Oleh itu, MPS membuat keputusan bahawa rundingan bagi menentukan pihak yang menanggung kos penyelenggaraan aset adalah dibenarkan, asalkan ia dipersetujui oleh pihak berkontrak.

The Defendants' Submission

[7] The defendants contended that ss. 56 and 57 of CBA are unconstitutional and void as it has the effect of vesting judicial power in the SAC in contravention of arts. 8 and 121 of the Federal Constitution. Further ss. 56 and 57 of the CBA have the effect of denying a litigant substantive due process as the parties are deprived of the opportunity of calling their respective experts on Islamic law for the determination of the court.

[8] Under s. 57 of the CBA, the court is bound to accept and apply the ruling of SAC since it is as such determinative in nature. The court is precluded from taking any position to the contrary notwithstanding judicial powers of the Federation being vested with the judiciary.

[9] The first defendant also submitted that by virtue of ss. 56 and 57 of the CBA, the court is precluded from relying, or considering, the opinions of experts when dealing with matters involving or concerning Islamic law. Further, both sections would deprive the parties and the court recourse to the views and opinions of other experts. It would further deny the opportunity to test the veracity of the evidence. The court ought to be able to consider the views of experts and decide on one of most credible. Islamic law is a matter of specialized expertise in which when determining and deciding, the court is guided by the opinions of experts whom parties are entitled to produce and rely in law.

[10] In summary, the first defendant had questioned the constitutionality of ss. 56 and 57 of the CBA by filing this application based on the following:

(a) That the SAC should not be vested with the power to ascertain Islamic law on the basis of art. 74 and read together with the Ninth Schedule of the Federal Constitution;

(b) That the judicial function of the courts has been vested in the SAC; and

(c) That ss. 56 and 57 of the CBA would deny the first defendant's constitutional right to a fair hearing under art. 8 of the Federal Constitution.

The Plaintiff's Submission

[11] The plaintiff submitted that the first defendant's application must be dismissed with costs for the following reasons:

(a) The Court of Appeal in *Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd* [2013] 4 CLJ 794; [2013] 3 MLJ 269 at p. 277 has decided that ss. 56 and 57 of the CBA are constitutional. By virtue of the doctrine of *stare decisis,* the Court of Appeal's decision is a binding authority.

(b) Article 128 of the Federal Constitution only concerns laws that are invalid or laws that the Parliament has no power to make. In the present case, Parliament has the power to make law providing for the ascertainment of Islamic law pursuant to Item 4(k) of the Federal List of the Ninth Schedule of the Federal Constitution and both ss. 56 and 57 of the CBA were enacted under such power; and

(c) The duty of the SAC is merely to ascertain Islamic law on financial matters or business. The judicial functions remain with the court to determine the issues of which parties have pleaded and to determine the final outcome of the case. Furthermore, the SAC made it clear in its letter that they are not making a finding on the facts of the case or a decision on the outcome of the litigation but was merely analysing the Shariah issues referred to it and stating the relevant Shariah law with regard to the same.

Findings Of The Court

[12] I am in the agreement with the plaintiff for reasons below:

(a) The Court of Appeal in the case of *Tan Sri Abdul Khalid Ibrahim* had made it clear that:

> Sections 56 and 57 contain clear and unambiguous provisions to the effect that whenever there is any Shariah question arising in any proceedings relating to Islamic financial business before eg any court, it is mandatory for the court to invoke s 56 and refer it to the SAC, a statutory expert, for a ruling. The duty of the SAC is confined exclusively to the ascertainment of the Islamic Law on financial matters or business.
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> The SAC, like any other expert, does not perform any judicial function in the determination of the ultimate outcome of the litigation before the court, and so cannot be said to usurp the judicial functions of the court. Hence ss. 56-57 are valid and constitutional'

(b) The Court of Appeal further reasoned at pp. 444-445 (CLJ); pp. 275-276 (MLJ) as follows:

> We take the view that the constitutionality of ss. 56 and 57 is to be tested by reference to the legislative powers of Parliament to enact these sections. Article 74(1) empowers Parliament to make laws with respect to any of the matters enumerated in the Federal List (List 1), or the Concurrent List (List 3), of the Ninth Schedule to the Federal Constitution. Item 4(k) of List 1 clearly provides that Parliament is empowered to make laws in respect of:

> 4. Civil and criminal law and procedure and the administration of justice, including ...
>
> (k) ascertainment of Islamic law and other personal laws for purposes of federal law

(c) Similar pronouncement is also found in *Mohd Alias bin Ibrahim v. RHB Bank Bhd & Anor* [2011] 4 CLJ 654; [2011] 3 MLJ 26 at p. 682 (CLJ); p. 53 (MLJ) where the court held that:

> Having regard to the above, it is clear that the SAC was established as an authority for the ascertainment of Islamic law for the purpose of banking business, takaful business and Islamic financial business. Note that the key words here are 'ascertainment of Islamic law.

(d) Having regard of the above cases, I find that ss. 56 and 57 of the CBA are valid and Constitutional Federal law made pursuant art. 74(1) read together with Item 4(10) of the Federal List of the Ninth Schedule of the Federal Constitution for the ascertainment of Islamic law. Further, the decision in *Tan Sri Abdul Khalid* is binding upon this court by virtue of the doctrine of *stare decisis*. In *Assistant Collector Of Land Revenues & Ors v. Alfeus Yahsu & Anor And Another Appeal* [2016] 7 CLJ 848, the Court of Appeal states that:

> Judicial hierarchy must be observed in the interests of finality and certainty in the law and for orderly development of legal rules as well as for the courts and lawyers to regulate their affairs. Failure to observe judicial precedents would create chaos and misapprehensions in the judicial system. This fact was certainly borne in mind by the Court of Appeal in *Periasamy s/o Sinnappan & Anor v. Public Prosecutor* [1996] 3 CLJ 187; [1996] 2 MLJ 557 wherein Gopal Sri Ram JCA said (at p 582):
>
> We may add that it does not augur well for judicial discipline when a High Court judge treats the decision of the Supreme Court with little or no respect in disobedience to the well-entrenched doctrine of *stare decisis*. We trust that the occasion will never arise again when we have to remind High Court judges that they are bound by all judgments of this court and of the Federal Court and they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein.

(e) Since it has already been established by the Court of Appeal in *Tan Sri Abdul Khalid* that ss. 56 and 57 of the CBA are valid and constitutional, it follows that both of those sections do not fall under the scope of art. 128 of the Federal Constitution. Therefore I find that there is no need for a referral to be made to the Federal Court. Moreover art. 128 of the Federal Constitution only concerns 'invalid laws'.

Article 128. Jurisdiction of Federal Court

(1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction:

(a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and

(b) disputes on any other question between States or between the Federation and any State.

(f) Similarly in *Mohd Alias,* the plaintiff therein cited art. 128 of the Federal Constitution and s. 84 of the Courts of Judicature Act and raised as preliminary issue that the High Court has no jurisdiction to answer the three questions posed with regard to the validities of ss. 56 and 57 of the CBA and hence the High Court should refer the matter to the Federal Court for determination. In dismissing the preliminary issue, the court held at p. 666 (CLJ); p. 39 (MLJ) as follows:

> The second is that the impugned provisions were made pursuant to item 4(k) of List I in the Federal List of the Ninth Schedule to the Federal Constitution. Item 4(k) allows Parliament to make law in respect of ascertainment of Islamic law for purposes of civil law.
>
> Hence, the impugned provisions are valid federal laws enacted by the Parliament.

Further at p. 667 (CLJ); p. 40 (MLJ), the court states that:

> Relying on the premise that the impugned provisions are valid federal laws enacted by the Parliament which is within the jurisdiction and powers of this court as well as the non-mandatory wordings of s 84 of the Courts of Judicature Act 1964 (Act 91), the preliminary objection must fail. The court requested all parties to proceed with the crux of the matter.

(g) The function of the SAC is only to ascertain Islamic law on financial matters or business, while the function of the judiciary is to decide on the issues pleaded by the parties and to decide on the final outcome of a suit. Therefore ss. 56 and 57 of the CBA cannot be said to usurp the judicial functions of a Court. The Court of Appeal in *Tan Sri Abdul Khalid* made a clear distinction between the role of the Judiciary and the SAC and held that SAC does not perform any judicial function.

> The duty of the SAC is confined exclusively to the ascertainment of "the Islamic Law on financial matters or business. The judicial function is within the domain of the court ie to decide on the issues which the parties have pleaded. The fact that the court is

bound by the ruling of the SAC under s. 57 does not detract from the judicial functions and duties of the court in providing a resolution to the dispute(s) which the parties have submitted to the jurisdiction of the court. In applying the SAC ruling to the particular facts of the case before the court, the judicial functions of the court to hear and determine a dispute remain "inviolate. The SAC, like any other expert, does not perform any judicial function in the determination of the ultimate outcome of the litigation before the court, and so cannot be said to usurp the judicial functions of the court. Hence, ss. 56-57 are valid and constitutional."

(h) In the present case the reference made to the SAC by the order of the Court of Appeal dated 15 September 2015 is only for the ascertainment of Shariah law regarding cl. 2.8 of the Ijarah agreements ie, whether the clause is Shariah compliance. The said reference was not made to SAC to decide on any other issues of facts between the parties nor was it for the final determination of the dispute between the parties. In fact, the SAC has made it clear from the outset that its role in this matter was confined to analysing Shariah issues and was not exercising any judicial function when reference was made to it pursuant to s. 56 of the CBA.

[13] Having taking into the consideration above, I finds that ss. 56 and 57 of the CBA do not have the effect of vesting judicial power in the SAC and the roles and duties of the court and SAC are mutually exclusive. Therefore the first defendant's application at encl. 129 herein is dismissed with costs.